

**These Reasons for Decision were originally issued on a confidential basis and later published pursuant to the terms of the Order issued in the same application on March 14, 2025**



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Citation: *Katanga Mining Limited v Ontario Securities Commission*, 2025 ONCMT 4  
Date: 2025-03-03  
File No. 2024-16

## **KATANGA MINING LIMITED**

**-and-**

## **ONTARIO SECURITIES COMMISSION**

### **REASONS FOR DECISION**

**(Section 17 of the *Securities Act*, RSO 1990, c S.5 and Rule 22(4) of the *Capital Markets Tribunal Rules of Procedure and Forms*)**

**Adjudicators:** Jane Waechter (chair of the panel)  
Russell Juriansz  
Dale R. Ponder

**Hearing:** By videoconference, February 13, 2025

**Appearances:** Aaron Dantowitz   For the Ontario Securities Commission  
Derek Ferris  
Nitasha Syed

Amanda McLachlan   For Katanga Mining Limited  
Shaan Tolani  
Pavan Pasha

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## REASONS FOR DECISION

### 1. OVERVIEW

- [1] Katanga Mining Limited applied under s. 17(1) of the *Securities Act* (the **Act**)<sup>1</sup> to disclose certain documents received during a confidential investigation by the Ontario Securities Commission (the **Confidential Documents**) to the internal and external counsel of its parent companies Glencore International AG and Glencore plc (together, **Glencore**). The Confidential Documents are subject to the confidentiality provisions of s. 16 of the *Act* and may not be disclosed without an order of the Capital Markets Tribunal.
- [2] For the reasons that follow, we issued an order on February 14, 2025 granting the relief sought by Katanga. We were satisfied that it was in the public interest to grant narrow relief to permit Katanga to disclose the requested documents to Glencore's internal and external counsel for review, subject to those counsel signing an undertaking that they are bound by the confidentiality provisions of s. 16 of the *Act*. Section 16 otherwise remains in force and requires that there is no disclosure beyond those listed internal and external counsel.

### 2. BACKGROUND

- [3] Katanga was a reporting issuer with shares listed on the Toronto Stock Exchange. In March 2017, Katanga and several of its officers and directors became the subject of a confidential investigation by the Commission. The investigation led to allegations related to misstatements of Katanga's financial position and the results of its operations in its financial disclosure.
- [4] In December 2018, Katanga and seven individual respondents, who were officers and directors of Katanga, reached a settlement agreement with the Commission. The Tribunal approved the settlement agreement on December 18, 2018.<sup>2</sup>
- [5] Katanga became a wholly owned subsidiary of Glencore in 2020. Before that, Glencore was Katanga's only customer and its majority shareholder.

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<sup>1</sup> RSO 1990, c S.5 (**Act**)

<sup>2</sup> *Katanga Mining Limited (Re)*, 2018 ONSEC 59

- [6] Glencore is a defendant in a civil claim in the High Court of Justice, England and Wales (**UK Court**) alleging material misleading statements and omissions by Katanga in its public company disclosure. The UK pleadings refer to the Commission's investigation and settlement agreement with Katanga.
- [7] The UK Court ordered that, among other records, documents provided by the Commission to Katanga during the investigation must be disclosed in the UK proceeding, to the extent they are relevant to the issues in the litigation. As a result, Katanga applied to the Tribunal to allow Glencore's internal and external counsel review the Confidential Documents for relevance to the UK claim.
- [8] We have little information about the circumstances of the UK Court order that requires disclosure of documents that are rarely disclosable in Ontario civil litigation. We have a general understanding, based on submissions rather than evidence, that the UK Court is waiting for a motion relating to the documents at issue in this application.
- [9] Despite the Commission's investigation ending, the statutory non-disclosure requirements continue to apply to Katanga under s. 16 of the *Act*.

### **3. ISSUES**

- [10] The sole issue was whether Katanga had demonstrated that it is in the public interest to grant a s. 17 order permitting it to disclose the Confidential Documents to members of Glencore's internal and external legal team so that they can determine which of the Confidential Documents, if any, are relevant to the UK civil proceeding.

### **4. ANALYSIS**

#### **4.1 Introduction**

- [11] The Tribunal may order that confidential documents related to an investigation be disclosed under s. 17(1)(b) of the *Act* if it "considers that it would be in the public interest" to do so. Katanga bears the burden of demonstrating that the proposed order is in the public interest.<sup>3</sup> The public interest threshold is high, and the Tribunal seldom provides exceptions to the statutory confidentiality

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<sup>3</sup> *Eric Inspektor*, 2014 ONSEC 39 at para 23

requirements in s. 16 of the *Act*. The Tribunal has previously stated s. 17 disclosure orders are only granted in “the most unusual circumstances”.<sup>4</sup>

- [12] When determining whether a s. 17 order should be granted, the Tribunal must:
- a. consider the purpose for which the evidence is sought and the specific circumstances of the case; and
  - b. balance the continued requirements for confidentiality with its assessment of the public interest at stake, including harm to the person whose testimony is sought.<sup>5</sup>
- [13] An additional non-exhaustive list of factors that the Tribunal has considered includes:
- a. the high degree of confidentiality associated with compelled evidence and the strict limitations on its use;
  - b. the reasonable expectations of witnesses compelled to provide evidence;
  - c. the potential harm to witnesses if the Tribunal authorizes use and disclosure of their compelled evidence;
  - d. the protections against self-incrimination provided by the *Charter*,<sup>6</sup> the *Canada Evidence Act*,<sup>7</sup> and the *Ontario Evidence Act*;<sup>8</sup> and
  - e. the integrity of Commission investigations.<sup>9</sup>

#### **4.2 The purpose for which the evidence is sought and the specific circumstances of the case**

- [14] Katanga asked us to consider narrow relief to permit disclosure to Glencore’s internal and external counsel, so that they can assess whether the Confidential Documents are relevant to the UK claim. Katanga will require the listed internal

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<sup>4</sup> *Re Black (2008)*, 31 O.S.C.B 10397 at para 220 (*Black*)

<sup>5</sup> *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2002 CanLII 44980 (Ont CA) at para 15, *aff’d by Deloitte & Touche LLP v Ontario (Securities Commission)*, 2003 SCC 61 at para 13; *Coughlan, Re*, [2000] O.J. No. 5109, 102 A.C.W.S. (3d) 241 at para 38

<sup>6</sup> 2 Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

<sup>7</sup> RSC 1985, c C-5

<sup>8</sup> RSO 1990, c E.23

<sup>9</sup> *Black* at para 135

and external counsel to sign undertakings to be bound by the confidentiality requirements of s. 16 of the *Act* before receiving the Confidential Documents.

- [15] Katanga submitted in oral argument that a relevance assessment under UK law cannot be made by Ontario lawyers who are not qualified to practice law in the UK. We agree.
- [16] In this case, the proposed recipients of the Confidential Documents are counsel for Katanga's parent, which is involved in defending a civil action with allegations about Katanga's securities law obligations. The close relationship between Glencore and its wholly owned subsidiary Katanga makes this disclosure request akin to providing disclosure to Katanga's own counsel. It is clear that the requested disclosure is not being made to an outsider to Katanga's conduct.
- [17] Subsection 16(1.1)(a) of the *Act* permits disclosure of confidential investigation documents to counsel for the purpose of receiving legal advice during an investigation. Katanga described its disclosure request as a logical extension of the presumptive statutory exception that allows disclosure to a company's legal counsel. Although that provision does not apply to counsel for a parent company, we note that s. 16 illustrates the value in allowing individuals and companies who are subject to confidentiality obligations to obtain legal advice. We are of the view that the same value would result from providing Katanga-related documents to counsel for its parent for the limited purpose of obtaining legal advice.
- [18] We found that providing investigation-related documents to legal counsel who are bound by the provisions of s. 16 of the *Act* preserves the confidentiality requirements of s. 16.

#### **4.3 Balance the continued requirements for confidentiality with an assessment of the public interest at stake, including harm to the person whose testimony is sought**

- [19] Given our finding that the confidentiality requirements in s. 16 will be preserved by requiring undertakings of confidentiality in the order requested by Katanga, the public interest against disclosure was not strongly in issue. We note simply that the witnesses who may be impacted by this narrow order have been notified and have either taken no position or not responded. We do not see an impact on

witnesses when the Confidential Documents go into the hands of counsel who are subject to non-disclosure obligations. Similarly, it does not appear that protections against self-incrimination under Canadian law are relevant to the proposed narrow disclosure. Finally, the strictly limited purpose for this disclosure does not impact the integrity of the Commission's investigations, given that the Katanga investigation is closed, and the Tribunal is not being asked to order any further disclosure that could impact the Commission's investigations generally.

[20] We have ordered that the documents may be disclosed to a list of Glencore's internal and external legal counsel for the purposes of reviewing the documents for relevance to the UK proceeding. We made this order subject to the term, imposed under s. 17(4) of the *Act*, that they sign acknowledgments that they are bound by the provisions of s. 16 of the *Act*. In doing so, we make no decision about whether, if assessed as relevant, the documents may be disclosed in the UK proceeding. This Tribunal has exclusive statutory jurisdiction to determine the public interest when disclosure of documents protected by s. 16 confidentiality requirements is in issue.

## 5. CONCLUSION

[21] For the reasons above, we ordered that:

- a. pursuant to 17(1) of the *Act*, Katanga is authorized to identify and disclose the documents sent by the Commission to Katanga in connection with the Investigation, as listed at Schedule "A" to the Order along with any enclosures referenced in such documents (the **Confidential Documents**), to:
  - i. Shaun Teichner – General Counsel, Glencore;
  - ii. Sarah Steece – Counsel, Glencore; and
  - iii. the following members of Clifford Chance LLP, Glencore's external legal counsel in the United Kingdom, and its barrister team:
  - iv. Luke Tolaini;
  - v. Kelwin Nicholls;

- vi. Harriet Slack;
- vii. Michael Gorrie;
- viii. Olivia Johnson;
- ix. Ben McLachlan;
- x. John Moran;
- xi. Bethany Campbell;
- xii. Lucy Ing;
- xiii. Richard Hill KC of 4 Stone Buildings Chambers;
- xiv. Tony Singla KC of Brick Court Chambers;
- xv. Gregory Denton-Cox of 4 Stone Buildings Chambers;
- xvi. Kyle Lawson of Brick Court Chambers; and
- xvii. Jacob Rabinowitz of Brick Court Chambers;

(collectively, the **Recipients**)

- b. except as expressly provided for in paragraph 1 of the Order, the Confidential Documents shall continue to be the subject of the confidentiality provisions of section 16 of the *Act*;
- c. before disclosure is made to the Recipients, Katanga will obtain an acknowledgment, in a form that is acceptable to the Commission, from each of the Recipients that they are bound by the confidentiality provisions of section 16 of the *Act*, and Katanga shall provide the acknowledgements to the Commission; and
- d. pursuant to rule 22(4) of the *Capital Markets Tribunal Rules of Procedure and Forms*, the Order and all adjudicative records in connection with the application are marked as confidential and shall not be made available to the public, subject to further order of the Tribunal, with the exception that Katanga is authorized to disclose this Order to the Recipients.



Dated at Toronto this 3<sup>rd</sup> day of March, 2025

*"Jane Waechter"*

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Jane Waechter

*"Russell Juriansz"*

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Russell Juriansz

*"Dale R. Ponder"*

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Dale R. Ponder